

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: N.C. ENVIRONMENTAL MANAGEMENT COMMISSION

RULE CITATION: 15A NCAC 02H – ALL RULES

RECOMMENDED ACTION:

X Approve, but note staff's comment

COMMENT:

These rules are submitted to you to re-codify rules that were originally adopted by the Environmental Management Commission. They were then approved by the RRC (after considerable discussion and rewriting) and then disapproved by the legislature. According to the session law set out below the agency is free to adopt the session law provisions as rules but they must be "substantively identical to the provisions of Sections 2 through 13 of this act." It appears these rules have to be filed with the RRC in the course of this rulemaking.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2005

SESSION LAW 2006-246

SENATE BILL 1566

**AN ACT TO PROVIDE FOR THE IMPLEMENTATION OF FEDERAL PHASE II
STORMWATER MANAGEMENT REQUIREMENTS AND TO PROTECT
WATER QUALITY, AS RECOMMENDED BY THE ENVIRONMENTAL
REVIEW COMMISSION.**

The General Assembly of North Carolina enacts:

SECTION 1.(a) Disapproval of Certain Rules. – Pursuant to G.S. 150B-21.3 and S.L. 2003-229, the following rules, as adopted by the Environmental Management Commission and approved by the Rules Review Commission on 17 November 2005, are disapproved:

- 15A NCAC 2H.1014 (Stormwater Management for Urbanizing Areas)
- 15A NCAC 2H.1015 (Urbanizing Area Definitions)
- 15A NCAC 2H.1016 (Urbanizing County Designations)
- 15A NCAC 2H.1017 (Application Schedule and Required Contents)
- 15A NCAC 2H.1018 (Post-Construction Model Practices)
- 15A NCAC 2H.1019 (Exceptions)
- 15A NCAC 2H.0126 (Stormwater Discharges)
- 15A NCAC 2H.0150 (Definitions)
- 15A NCAC 2H.0151 (Public Entity Designations)
- 15A NCAC 2H.0152 (Petitions)
- 15A NCAC 2H.0153 (Application Schedule and Required Contents)

15A NCAC 2H.0154 (Implementation Schedule)
15A NCAC 2H.0155 (Post-Construction Model Practices)
15A NCAC 2H.0156 (Exceptions)

SECTION 15. Additional Rule Making. – The Commission may adopt rules to replace the rules that are disapproved as provided in subsection (a) of Section 1 of this act. If the Commission adopts rules pursuant to this section, notwithstanding G.S. 150B-19(4), the rules shall be substantively identical to the provisions of Sections 2 through 13 of this act. The Commission may reorganize or renumber any of the rules to which this section applies at its discretion. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2).

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

SESSION LAW 2008-211

SENATE BILL 1967

AN ACT TO PROVIDE FOR IMPROVEMENTS IN THE MANAGEMENT OF
STORMWATER IN THE COASTAL COUNTIES IN ORDER TO PROTECT
WATER QUALITY.

The General Assembly of North Carolina enacts:

SECTION 1.(a) Disapprove Rule. – Pursuant to G.S. 150B-21.3(b1), 15A NCAC 02H .1005 (Stormwater Requirements: Coastal Counties), as adopted by the Environmental Management Commission on 10 January 2008 and approved by the Rules Review Commission on 20 March 2008, is disapproved.

SECTION 4. Additional Rule Making. – The Commission may adopt rules to replace the rules that are disapproved or superseded as provided in Section 1 of this act. If the Commission adopts rules pursuant to this section, notwithstanding G.S. 150B-19(4), the rules shall be substantively identical to the provisions of Section 2 of this act. The Commission may reorganize or renumber any of the rules to which this section applies at its discretion. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2).

At the same time the RRC has no authority to object to these rules for any reason. That is the effect of the highlighted portion of the session laws.

I am asking the agency to make certain technical changes, but once again you have no authority to force them to comply with those requests, (even though in my not so humble opinion they are quite good and reasonable requests and will only improve the rules).

The agency says in both its submission for filing (highlighted below) and its notice of text that there is no requirement for a public hearing. I do not agree with that opinion as a matter of law (unless there is no legal obligation to engage in a largely futile, but legally required, act). These rules are exempted only from a portion of the APA that concerns review of rules by the RRC and the actions that the RRC is permitted or required to take. The agency is not expressly exempted from the portions of the APA concerning any and all other aspects of rulemaking including notice, comment, and public hearing. But I do find that the effect of the session laws is to make most public comment useless, since the agency is barred from

making any changes in the rules that are not in the session law, including adding or deleting any material requirements.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Environment and Natural Resources intends to adopt the rules cited as 15A NCAC 02H .0150-.0154, .1014-.1017 and amend the rules cited as 15A NCAC 02H .0126, .1002, .1005.

Proposed Effective Date: *Upon Legislative Approval*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): The Session Laws from which these requirements are being moved from state that a public hearing is not required for moving the requirements to the rules. This is because the requirements are not changing from what is currently being implemented. (S.L. 2006-246, Section 15; S.L. 2008-211, Section 4)*

Reason for Proposed Action: *The two Session Laws (SL), 2006-246 and 2008-211, disapproved and replaced permanent rules, 2H .0126, 2H .1014, and 2H .1005, adopted by the EMC. The requirements of SL 2006-246 have been implemented since they became effective on July 1, 2007. The requirements of SL 2008-211 have been implemented since they became effective on October 1, 2008. These SL's state that the EMC may adopt rules to replace the rules that were disapproved within the SL's, but the EMC cannot change the requirements. These draft rules are placing the same requirements of the SL's that are currently being implemented, back into the EMC's rules. This is being done to reduce confusion for the regulated community and our staff by having all the stormwater requirements together in the 2H rules. There is no change to the current requirements being implemented by adopting these rules. (S.L. 2006-246, Section 15; S.L. 2008-211, Section 4).*

Procedure by which a person can object to the agency on a proposed rule: *A person can submit written comments to the contact below, objecting to the proposed rules. However, the Session Laws do not allow the EMC to make changes to the current requirements being implemented in the session laws. So, even with objections, the requirements copied from the SL's cannot be changed. (S.L. 2006-246, Section 15; S.L. 2008-211, Section 4).*

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AGENCY: N.C. ENVIRONMENTAL MANAGEMENT COMMISSION

RULE CITATION: 15A NCAC 02H .1002

RECOMMENDED ACTION:

X Approve, but note staff's comment

Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

Counsel does not agree that the amendment of this rule makes it subject to the provisions of S.L. 2006-246 or S.L. 2008-211 as asserted in the submission for filing. At the same time it appears the only changes in this rule are adding definitions from the cited session laws to the current definition rule. Those definitions cannot be substantively altered from the definition in the law. Counsel is satisfied that this rulemaking amendment satisfies the spirit of the session laws, if not the precise letter of the law.